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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 957

ROBERT SOBLEN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. .....

ROBERT SOBLEN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Robert Soblen respectfully requests a writ of certiorari to the Court of Appeals for the Second Circuit to review a judgment of that Court, which (1) affirmed a judgment of the District Court for the Southern District of New York convicting Petitioner of conspiracy to commit espionage and sentencing him to life imprisonment, and (2) affirmed an order of the District Court denying Petitioner's motion for a new trial on the ground of newly discovered evidence.

The Opinions Delivered in the Courts Below.

The opinion of the District Court, at the sentencing of Petitioner is reported at 199 F. Supp. 11, and is printed as Appendix D to this petition pp. 65a-68a. The opinion of the District Court denying the motion for a new trial is not yet reported. It is printed as Appendix A to this petition pp. 1a-54a. The opinion of the Court of Appeals has

not yet been reported; it is printed as Appendix B to this petition pp. 55a-63a.

Jurisdiction.

The judgment of the Court of Appeals sought to be reviewed was made and entered March 13, 1962. It is printed as Appendix C to this petition p. 64a. On April 6, 1962 an extension to May 12, 1962 of the time within which to petition for a writ of certiorari was granted by order of Mr. Justice JOHN M. HARLAN of this Court.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

The Questions Presented for Review.

1. Whether the Constitutional demands of Due Process required the Government in submitting the testimony of Jack Soble, its principal witness (and Petitioner's brother) to inform the jury that Soble was almost completely insane, and that he was suffering from a progressive organic brain disease that affected his memory, and that he suffered in addition from a serious psychiatric disorder.

2. Whether the Petitioner was entitled to a new trial upon the ground of newly discovered evidence and in the interests of justice, when he discovered subsequent to his conviction

(a) that vital testimony against Petitioner (to the effect that he received from Dr. Hans Hirschfeld information relating to the OSS) had been contradicted by Dr. Hirschfeld's testimony given before a federal grand jury;

(b) that the prosecution withheld information that Dr. Hirschfeld was a prominent West German Government official and deliberately misrepresented

its knowledge of Dr. Hirschfeld's residence and availability;

(c) that the prosecution withheld evidence that Jack Soble, the main witness against Petitioner was insane, and that he was suffering from a progressive organic brain disease, and that he was also suffering from a grave psychiatric disorder.

3. Whether the Trial Court committed prejudicial error in permitting testimony of hearsay statements and declarations implicating Petitioner of complicity in the conspiracy, that were made by the alleged co-conspirators Soble, Fedotov and Zubilin after the termination of the conspiracy.

4. Whether the Trial Court committed prejudicial error in permitting alleged co-conspirators to testify concerning Petitioner's conduct and their own conduct unrelated to the conspiracy, that occurred prior to the alleged conspiracy (in some instances more than 20 years before the alleged conspiracy began) and after the termination of the alleged conspiracy.

5. Whether the evidence purporting to show that Petitioner and others attempted to secure information about Trotskyites, Mensheviks and German civil servants was sufficient to sustain the verdict of guilt of conspiring to secure and transmit information "respecting the national defense", in violation of Title 18 U. S. C. Sections 793 and 794.

6. Whether the charge that Petitioner conspired to *obtain* information connected with the national defense (set forth in the First Count of the indictment) was barred by the statute of limitations and whether the submission

to the jury of the barred count and evidence relating to it was prejudicial error requiring reversal of the conviction of the charge that Petitioner conspired to *transmit* national defense information to the Soviet Union (set forth in the Second Count of the indictment).

7. Whether Petitioner was deprived of rights guaranteed by the Fifth and Sixth Amendments to the Constitution by the Trial Court's conduct in (1) compelling Petitioner to proceed to trial with newly-retained and wholly unprepared trial counsel (2) compelling Petitioner who was suffering from leukemia to proceed to trial at a time when he was not in a physical condition to stand trial or to make decisions with respect to his defense (3) refusing at the close of the People's case to grant Petitioner who was not then in a mental or physical condition to make a decision, an over-night adjournment to decide whether he should testify on his own behalf (4) by withholding from defense counsel at the trial and on the motion for a new trial, relevant medical reports and FBI reports.

Constitutional Provisions and Statutes Involved.

The constitutional provisions involved are the Fifth and Sixth Amendments to the United States Constitution. The statutes involved are Title 18, U. S. C. §§793 and 794 (1958); the Act of June 25, 1948, Ch. 645, Pt. II, Ch. 213 §3282, 62 Stat. 828;* and the Act of September 23, 1950, Ch. 1024, §19, 64 Stat. 1005, the pertinent portions of which are reproduced in Appendix E to this petition pp. 69a-72a.

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* Enacted as § 3282 of Title 18, U. S. C. (1948 ed.). The present § 3282 of Title 18, U. S. C. was enacted in 1954.

Statement of the Case.

Petitioner, an American citizen, was indicted November 29, 1960 by a federal grand jury in the Southern District of New York. The First Count of the indictment charged a conspiracy to obtain information relating to the national defense of the United States; the Second Count alleged a conspiracy to transmit such information to the Soviet Union. Eighteen persons were named in the indictment as co-conspirators but only Petitioner was made a defendant.

This statement of the case is of necessity based on the testimony of the witnesses for the prosecution. The substance of the Government's case is set forth here as if true though the two main witnesses for the prosecution are at best unreliable and some of their testimony is incredible and some of their testimony is patently false.

It is claimed that the unlawful agreements to obtain and transmit national defense information were entered into in 1940 and continued (according to the indictment) to 1956. Jack Soble, who as shall later be shown was almost completely insane at the time of the trial, testified that the agreement to commit espionage was made in Moscow between himself and Lavrentia Beria, head of the Russian secret police (R. 329-31, 1740, 1742).* It is not claimed that Petitioner was present at the meeting.

Soble's account of his understanding with Lavrentia Beria strains credulity and is obviously the product of a

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* The Court of Appeals granted Petitioner leave to dispense with a printed appendix and to file a partial appendix. References to the pages of the Record on Appeal are indicated as follows: (R. . . .). Record pagination of all portions of the Record on Appeal other than the stenographic transcript of the testimony given at the trial, is set forth at the *lower* right corner of each page. Record pagination of the stenographic transcript of the testimony given at the trial (R. 1-1739) is set forth at the *upper* right corner of each page.

disordered mind. According to Soble, Beria agreed to allow Soble and his family to leave Lithuania and stated that in return "he would like" Soble and Petitioner to "go abroad" and "gather any information of value to the Soviet Union" (R. 329, 331). Nothing was said about the place where Soble was to go (the emigration to the United States was not planned); nothing was said about the kind of information to be obtained or the manner in which it was to be secured. No reference whatever was made to the United States or to information relating to the national defense.

Soble testified that when he, the Petitioner and their families finally arrived in America he met Zarubin (also known as Zubilin) a Secretary at the Russian Embassy, and one of the main co-plotters. At that time, according to Soble's testimony, the general suggestion made by Beria was given definite form. Soble testified to the following conversation at his meeting with Zarubin (R. 368-369).

> "A. Yes, right away. I mean, without any preparation, he said that "You came to America. I know the whole case about you. You came and your brother Robert came to America. You took out all your relatives, your parents, sisters, and we gave you everything you wanted. I mean, the family is now safe and we want you to keep to the other part of the agreement to work for us.
>
> Q. Did he say anything else to you at that time? A. He said, that is, Zarubin said that, as you understand, there is a war going on "—because there was already going on the war between Russia and Germany at that time—" *and we are allies with America and you have to help in the common general effort and you will work for us and gather any information you can.* (Emphasis ours.)

There was no evidence of any other communicated agreement or understanding between the alleged conspirators and no evidence of any conduct from which a plan to secure or transmit defense secrets can be inferred. According to the testimony the alleged conspirators attempted thereafter to secure information about Trotskyites and Mensheviks, their attempts to infiltrate unions and their attempts to form a common-front against the Stalinists within the radical movement (R. 385, 410, 425, 657, 659-60, 669-70, 675-679). One other area of interest was the political activities and affiliations of German civil servants, some of whom were living in the United States and others in Germany (R. 1195, 1197, 1202-1203).

There was no evidence of interest in or attempt to secure information about armed forces, instruments of war, army or navy installations, aircraft, vessels, military codes, defense plans or any other object enumerated in Sections 793 and 794 of Title 18 of the United States Code. On the contrary, the main witness Soble testified that the information sought had no relation to national defense (R. 669-670).

There is also very little direct evidence in the record with respect to any activity of the Petitioner either alone or in concert with his alleged co-conspirators. The only time it was claimed Jack Soble and the Petitioner worked together was in the late spring or early summer of 1945. Soble testified that at that time he intended to leave New York and transferred his "contacts" namely Lucy Booker and Floyd Miller to Petitioner (R. 433-435). There was no testimony with respect to any meeting or transaction between the Petitioner and Miss Booker. Her sole contribution to the alleged conspiracy was to allow her apartment to be used by Soble "as quarters in which the Trotskyite material is being typed and being done" (R. 424-424A, 862-863). Miller's dealings with the Petitioner were

completely innocent. Miller testified that at the time he met the Petitioner he was attempting to get a job as a newspaperman in Europe. The only communications between Miller and Petitioner, during the six months that they met, were on the subject of Miller's lack of success in securing work (R. 1047-8).

The only other person who testified with respect to the Petitioner's alleged conspiratorial conduct was Johanna Beker. Mrs. Beker stated that she received reports from two persons, Dr. Horst Baerensprung and Dr. Hans Hirschfeld, and that she transmitted those reports to Petitioner from 1943 to the early summer of 1945 (R. 1201, 1202). Dr. Baerensprung was described to Mrs. Beker as "a Social Democrat from Germany . . . doing much work with German refugee groups in America" (R. 1194). Baerensprung's reports were "of meetings of groups of Germans then living in the United States, their possible plans for party affiliations, and work in Germany after Hitler might be defeated" (R. 1195) and "on group meetings and drawing up of manifestos and plans of anti-fascist groups . . ." (R. 1204).

Mrs. Beker claimed that Dr. Hirschfeld, then employed in the Biographical Records Unit of the OSS (R. 2490), also furnished "biographical sketches of Germans, and, again a report of groups of Germans" (R. 1197). She testified further that in the spring of 1945 two or three of Dr. Hirschfeld's reports contained a statement that he had learned in his office (The Biographical Records Unit) that the United States Government was working on some "important military project and making great progress with it and this would decide the end of the war considerably" (R. 1207-1208). The reports, according to Mrs. Beker, stated that the military project was being devel-

oped in a locality in the northwest of the United States (R. 1208).

The OSS unit where Dr. Hirschfeld worked, as Petitioner learned after he was convicted, was employed merely in collating data secured from the public library and newspapers (R. 2490-2491, 2078). It was a unit of the Research and Analysis Branch of the OSS and its work was to secure biographical data about German civilians and civil servants, so that after Germany was conquered we "would know with whom to deal" (R. 2511, 2078). The persons employed in that unit were not given access to secret material for they were not American citizens (R. 2531) and that office of the OSS did not receive any information about military projects, defense measures or the development of weapons (R. 2492, 2493, 2512, 2534, 2078).

According to the testimony offered by the Government the alleged conspiracy ended in 1945. The meetings between the alleged conspirators ceased before the end of 1945 (R. 929), and before the end of that year the alleged conspirators dispersed and either left the country or ended their work in connection with the conspiracy, and the common plan was abandoned. Soble testified that the Zubilins,—the hub of the conspiracy,—left the United States in 1944 (R. 915); Chaudenko, Petitioner's alleged superior, left America before the end of 1945 (R. 929); Chaliapin, another of the alleged conspirators left at the end of 1944 (R. 915). Mrs. Beker according to her own testimony ceased her activities in 1945 (R. 1209-10) and Floyd Miller finished his part in the conspiracy in the early winter of 1945 (R. 1033). The Petitioner's alleged conspiratorial conduct also ended, according to the prosecution's witnesses, in 1945 or at the latest in 1946 (R. 465-6, 1209-10, 1537-8).

Although many "overt acts" said to have occurred after 1945 were set forth in the indictment, the Government relied

in the court below on only two overt acts that the Government contended, took place after 1945. One of the "overt acts" the Government contended was the Petitioner's "act" of advising his brother Soble, during the period from 1952 to 1956 to leave the country (R. 462-465). The second overt act relied on by the Government as proving a continuance of the conspiracy after 1945 was Soble's transmission of information to Borris Morros in 1954 (R. 962). Morros was not one of the original conspirators and Soble testified that in 1954 he had lost faith in the communist movement and was attempting to mislead Morros, not to work with him (R. 962-967).

At the time of the trial the defense knew or elicited on cross-examination certain facts relating to Soble's mental state. The Petitioner was then aware that Soble attempted suicide in 1958 by swallowing a large quantity of nuts and bolts; that he had been under observation at Bellevue in 1957, and that he was given twenty electro-convulsive shock treatments in 1958 and 1959 (R. 591-8). The Petitioner and the jury were thus informed that Soble had suffered from mental illness (R. 591-8). The true state of Soble's mental condition, however, was not discovered by the defense until after the trial. It was then discovered that Soble had been suffering from a progressive organic brain disease and in addition from a severe mentally disabling depression described as an involutional psychotic reaction. It was also learned that as a result of the organic impairment, Soble's memory was affected and that he might in his testimony have substituted imagined occurrences for real ones, without realizing that he was doing so (R. 2282-2284).

On the motion for a new trial, Petitioner produced a transcript of the testimony of Dr. Donald B. Rinsley, a psychiatrist at the Menninger Foundation, who treated

Sobble in 1958 at the medical center of the federal prison in Springfield. Dr. Rinsley's testimony, offered on the motion for a new trial, was in part as follows:

(R. 2282-2284):

"Q. Did you at any time form an opinion as to whether in the light of that diagnosis Jack Sobbe was capable of telling the truth? A. Yes, sir, I did.

Q. What was that opinion? A. The opinion was that he is capable of telling the truth. *If I may add to that, Sir?*

Q. Yes, you may. A. That one of his difficulties has been difficulty with memory, and that one could expect that at times because of a deficiency in memory, *and because of the nature of his mental illness, he is capable of filling in his gaps in memory with information which he believes to be true but which may not be true.*" (Emphasis ours.)

(R. 2286-87):

"Q. . . . Dr. Rinsley, could you state where on the ladder of mental illnesses in regard to seriousness, Jack Sobbe's mental illness would be found? In other words, how sick is Jack Sobbe. A. Well, I would like to answer that two ways, if I may.

Q. Surely. A. The first way would be by saying that, as I recall him and from my studies of him, I would have to say that Mr. Sobbe's mental illness is of the moderate to severe degree, and if I may, if we have the scale of zero to 10 and 10 is the worst, if you will, and zero is the least, I would place him about 7, perhaps 7½, perhaps 8. In other words, he is well along on this seriously ill side. He is much more seriously ill than he realizes".

Mrs. Beker, it will be recalled, testified that Dr. Hirschfeld submitted information gained from his office in the

OSS "that the United States was working on some important military project" in the northwest and that great progress was being made with the project (R. 1207-8). The Dr. Hirschfeld referred to by Mrs. Beker was not known to the defense (R. 1982, 1954). His identity was not disclosed during the trial and the prosecuting attorney led the defense to believe that Dr. Hirschfeld was not available to answer Mrs. Beker's accusations. At the close of the Government's case there was the following colloquy between the Court and chief counsel for the prosecution:

> The Court: Well, specifically where is Hirschfeld?
>
> Mr. Casey: *I don't know of my own knowledge. I believe he is in West Berlin.*
>
> The Court: In West ——
>
> Mr. Casey: *West Berlin, but I am not sure.*
>
> The Court: Would Mr. McCarthy know?
>
> Mr. Casey: I was told by a newspaperman that he was in West Berlin *this week.* He was interviewed there this week by a newspaperman I believe in West Berlin.
>
> The Court: All right.
>
> Mr. Casey: *I don't know where he is living. He could be living in the East, but I don't know"* (R. 1425-1426) (Emphasis ours.).

The denial of knowledge of Hirschfeld's place of residence was misleading, if not false. The Dr. Hirschfeld referred to in Mrs. Beker's testimony is a person of prominence in West Germany. He was an aide to Willy Brandt, Mayor of West Berlin, and was Chief of the Chancellery of the Senate of West Berlin (his title being that of Senatsdirektor). His name, address and telephone number are in the German Who's Who (R. 1968-9, 1973). The Government did not have the slightest difficulty in locating

Dr. Hirschfeld on a number of occasions when it wanted to communicate with him or have him testify before the grand jury in New York. (R. 2309-2312, 2320, 2336, 2346, 2461-2462, 2571, 2574; Mot. Ex. for id. A, H, K, L, M, Y, Z, AA)*.

When interrogated by the FBI, and again when he appeared before the federal grand jury in 1960, Dr. Hirschfeld categorically denied that he had ever turned over any secret material, or defense material, or information secured from the OSS to Mrs. Beker or to anyone else. He denied that he had ever seen Mrs. Beker before she was brought to West Berlin to "confront" him; and he denied that he ever received or had any knowledge of atomic weapons or secret military projects. All of that evidence contradicting Mrs. Beker was, of course, in the Government's possession during the course of the trial (Mot. Ex. for id. H, K, L, M, X, Y, Z, AA).

The Government had other evidence from completely impartial persons contradicting Mrs. Beker's testimony to the effect that Dr. Hirschfeld in an account of "activities in his office" (The Biographical Unit), reported that the "United States Government was working in some important military project" (R. 1207-1208). The Government had interrogated Hirschfeld's former colleagues in the OSS and the substance of their testimony was that neither the Biographical Records Unit or Dr. Hirschfeld had access to secret information or information relating to weapons or military projects (R. 2489-2495, 2509-2512; Mot. Ex, for id. N, O, P, Q, R, S, BB).

At the time of the indictment Petitioner was suffering from leukemia, a fatal disease commonly known as cancer

* References to the Exhibits for Identification introduced at the hearings on petitioner's motion for a new trial are indicated as follows: (Mot. Ex. for id.).

of the blood. When the case was reached for trial Petitioner's physical condition had deteriorated and he could not proceed without sedation and the administration of drugs (R. 14, 15). He sought a postponement of the trial but without success.*

At the conclusion of the People's case, Petitioner asked for an over-night adjournment because he was not in a physical or mental state to decide whether he should testify in his own defense (R. 1466-1467). The Court refused an adjournment for that purpose (R. 1469-1474), and Petitioner did not take the stand.

The case then went to the jury, which rendered a verdict convicting Petitioner upon both counts (R. 1633). At the time of sentence Petitioner asked for a deferment of sentence pending disposition of a proposed motion for a new trial on the ground that he and the Trial Court had just been informed by Professors Herbert Marcuse of Brandeis University and H. Stewart Hughes of Harvard University (the latter a grandson of former Chief Justice Hughes) that the work of the Biographical Unit had no connection with national defense (R. 1671-1674). The Trial Court declined the request and imposed a sentence of ten years upon the First Count and life imprisonment upon the Second Count of the indictment (R. 1686, 1720, 1799).

Reasons For Allowance of The Writ.

1. ***The prosecution's failure to inform the Jury that its principal witness was insane, and that his memory had been affected by a brain disease, constituted a denial of due process.***

* The Stenographic transcript of the hearings on Petitioner's application to stay the trial and the Order of Judge William B. Herlands denying that application are not included in the record on appeal. They were missing from the files of the United States District Court for the Southern District of New York (R. 1938).

The Government's case against Petitioner rested upon the testimony of Jack Soble, the Petitioner's younger brother. There is a serious question in a capital case with respect to the Government's right to present as its principal witness a person suffering from an organic brain disease. We do not believe that the testimony of such witness may be offered in any event without a full disclosure of his condition. The testimony of such witness is at best unreliable and dangerous. The danger is greatly increased in a conspiracy case where the ordinary rules of evidence do not apply and the witness, if he claims to be a co-conspirator, is permitted to testify about his own acts and statements and those of others, made or performed in the defendant's absence and without his knowledge. It is usually impossible to show the falsity of such testimony either on cross-examination or by direct evidence. The mere fact that such witness is *capable* of telling the truth is not a justification for presenting his testimony without revealing the facts necessary for a judgment of the reliability of the testimony. The fact that the witness is capable of fabricating without being aware of it should preclude the introduction of his testimony or require that it be introduced only after the jury has been fully apprised of the nature of the witness's mental disabilities.

At the time Soble's testimony was offered, he was a prisoner of the Federal Government. He had pleaded guilty of conspiracy to commit espionage, against his attorney's advice because, in his language:

> "I committed a crime because I lied to this Government. I came on the visa, having already falsified my questionnaire and not having answered if I was a Communist or not a Communist; what do you call lies and what do you call truth, Mr. Brill, in your career? I could have had a brilliant career here, dur-

ing the war when there was a heavy demand for people who spoke the German language.

I was afraid of applying for a job because I was afraid of the FBI.

Do you understand that I committed crimes? That is why I kept away. That is why I am shouting. I am glad that I am serving even this term because it showed me the way to truth" (R. 673-4).

* * * * * * *

"A. Don't you understand that? Don't you understand that an active Communist who is coming to this country and he lies right in the first questionnaire and he denies his past record, don't you understand that he is afraid of the truth coming out? I cannot understand your legal mind, even" (R. 682).

Before testifying against his brother the Petitioner, Soble was subjected to interviews with the FBI on at least 76 different dates on each of which virtually the same ground was covered (R. 497-506, 511-541, 563-571, 720, 727, 980, 988-1005; Tr. Ex. for id. 20-111, 117-125*). To subject a witness of such suggestibility to so great a number of rehearsals of the same story is at best, of doubtful propriety. The situation was not ameliorated by the closing address of the prosecuting attorney in which he referred to Soble's "fantastic memory" as proof that he was a trained professional spy (R. 1549). The prosecuting attorney failed in commenting on Soble's memory to advise the jury that Soble had been "reminded" of the "facts" on so very many occasions. Such conduct is not consistent with our traditional concept of fair trial and due process of law.

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* References to the Exhibits for Identification offered at the Trial are indicated as follows: (Tr. Ex. for id.....).

2. *Petitioner's motion for a new trial should have been granted both on the ground of newly discovered evidence and in the interests of justice.*

The two witnesses who testified to the Petitioner's alleged part in the conspiracy were Soble and Mrs. Beker. As previously shown, the Government withheld testimony showing that Soble because of his brain disease may not have known whether his own testimony was true or fabricated. It also withheld information that Mrs. Beker, a confessed perjuror (R. 1318-1336) had been directly contradicted before the Federal Grand Jury by Dr. Hirschfeld, a prominent, highly respected person, and that doubt had been cast upon that part of Mrs. Beker's testimony that the government considered most significant, by the statements of Dr. Hirschfeld's colleagues in the OSS.

Petitioner's counsel was not aware (a) that governmental medical reports existed showing that Jack Soble was suffering from an organic brain disease (R. 2282-3), (b) that Hans Hirschfeld had testified before the grand jury and had repudiated Mrs. Beker's testimony (R. 2309-10, 2461-2462; Mot. Ex. H for id.), (c) that the prosecuting attorney was misleading the Court in stating that he did not know where Hirschfeld lived and in suggesting that Hans Hirschfeld might be living in East Berlin and was therefore unavailable (R. 1425-6), (d) that Hans Hirschfeld was *in truth a very* well known, reputable West German official living in West Berlin, and (e) that Mrs. Beker's testimony that Dr. Hirschfeld secured information about the existence of a military project from his office was contradicted by the other persons employed in the same office (R. 2489-2495, 2509-2512; Mot. Ex. for id. N, O, P, Q, R, S, BB).

It should be noted here that the Government claims that it gave to Petitioner's trial attorney several parts of state-

ments that showed that Hirschfeld had on another occasion confronted Mrs. Beker in the presence of FBI agents and denied her accusations. However, defense counsel denied receipt of that information. In any event there is no claim that the information outlined in the preceding paragraph had been given to the defense.

The Court below, in discussing the medical report of Soble's mental illnesses, suggested that the prosecution's duty on its own initiative to disclose "exculpatory facts within its exclusive control" does not exist "when the facts are readily available to a diligent defender." (App. 62a*) We do not agree that in a capital case the Government may remain silent, counting upon the ability of defense counsel to ferret out facts known to the government that would tend to prove the defendant's innocence. The requirement that a defendant shall have shown diligence in the search for exculpatory evidence is not stressed by the courts where there has been such suppression of evidence by the prosecutor or the court as to constitute a denial of due process. *United States* v. *Dye*, 221 F. 2d 763 (3d Cir. 1955); *Delbridge* v. *United States*, 262 F. 2d 710, 712 (D. C. Cir. 1958); *Arbuckle* v. *United States*, 146 F. 2d 657, 660 (D. C. Cir. 1944).

The possibility or probability that more diligent defense counsel could have discovered some of the exculpatory evidence during the course of the trial, is in any event not decisive of the question under discussion. The issue is not the competence or ability of Petitioner's trial lawyer, but whether justice has been done, and in this case a negative answer must be given.

We believe it is the rule, though it has not been honored in the observance, that the government may not withhold

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* References to the pages of the Appendix to this petition are designated (App.....).

evidence bearing on the credibility of a witness it places on the stand. The failure to notify a defendant of the existence of evidence that would tend to show his innocence is tantamount to the suppression of material evidence, and requires the reversal of a conviction, *Berger* v. *United States* 295 U. S. 78, 88 (1935); *Wilde* v. *Wyoming* 362 U. S. 607 (1960) and see comment: New Trial Granted Because of Prosecution's Negligent Failure To Disclose Evidence Useful to Defense, 62 Colum. L. Rev., 526 (1962).

In the instant case the Government was not only guilty of withholding exculpatory evidence but of adopting a stratagem and of presenting evidence in such way as to deliberately deceive the jury and the defense. The prosecuting attorney presented evidence through the testimony of Otto Charles Doering Jr., formerly Chief Executive Officer of the Office of Strategic Services, that the purpose of the organization was to secure and analyze strategic military information needed by the Joint Chiefs of Staff. Doering also testified that the Biographical Records Unit was a part of the OSS (R. 1374, 1375, 1544), and that the identities of persons working on highly classified material was kept secret (R. 1377). Mrs. Johnson, archivist of the Strategic Services Unit testified that Baerensprung and Hirschfeld were employed by the Biographical Records Unit (R. 1370). Because of the government's failure to present any evidence relating to the function of the Biographical Records Unit the Jury and the defense were misled to believe that Hirschfeld was employed in a highly secret intelligence agency,* from which he stole vital military information.

* In his opening statement to the jury the prosecutor referred to the Petitioner's alleged connection with the securing of reports from Hirschfeld as an assignment "in the very heart of our own intelligence agency" (R. 240). The Biographical Records Unit is also described in the summation as an "Intelligence Agency" (R. 1545).

that was transmitted to the Petitioner. To prevent the correcting of that impression, which it knew to be false, the Government withheld from the defense the contradictory proof in its files. As Mrs. Hepner, Dr. Hirschfeld's assistant at the OSS, and Mrs. Stone, Administrator of the unit, testified on the motion for a new trial, the Biographical Records Unit had no access whatever to secret material or material of a military nature, and Dr. Hirschfeld's work in the Biographical Records Unit was to collate data obtained from the newspapers and public library at 42nd Street in New York City (R. 2509, 2531, 2490-93). Certainly the Petitioner's trial counsel cannot be held responsible for failing to suspect the Government of so unworthy a device, and of failing to call the witnesses who would have exposed it.

3. *The Trial Court committed prejudicial error in admitting hearsay declarations made by alleged co-conspirators after the conspiracy ended, that purported to show Petitioner's participation in the conspiracy.*

The Court below acknowledged that "the admission of hearsay testimony relating to conversations after 1945, particularly those between Jack Soble and various Russians in 1947" presented a question of serious error (App. 60a). As shown in the Statement of the Case, the alleged conspiracy terminated before 1946. The witness Soble testified that he went abroad after 1946 in order to make and establish new "contacts" for himself (R. 435-456A, 461-466). In addition to testifying about his own unsuccessful efforts to find new persons to work with in the years from 1946 to 1952 Soble testified to alleged conversations in Moscow in 1947 with Fedotov, and the Zubilins. Soble testified that in the alleged conversations that were supposed to have taken place in 1947 there were refer-

ences to Petitioner's earlier work and "contacts" in the United States, in which Petitioner's guilt of espionage was tacit and clearly implied (R. 431, 440-2).

At the close of the case the Jury was instructed to decide whether the conspiracy continued until after 1952 as the Government contended (R. 1605-1606). The Jury was also instructed that the statements and acts of co-conspirators were binding on Petitioner if they found that Petitioner participated in the conspiracy and if the statements and acts were in furtherance of the conspiracy (R. 1602). The conduct of Soble after 1945 could not, however, have been imputed to the conspiracy in which Petitioner was allegedly engaged because "there can be no furtherance of a conspiracy that has ended." *Lutwak* v. *United States*, 344 U. S. 604 at pp. 617-618 (1953). A conspiracy may not be deemed to be a continuing one unless there is "continuous cooperation of the conspirators to keep it up". *Fiswick* v. *United States*, 329 U. S. 211 at p. 216 (1946), *United States* v. *Kissel*, 218 U. S. 601, 607 (1910). The overt acts chargeable to Soble after 1945 were not in cooperation with any of the other alleged conspirators. His actions were not in concert with former co-conspirators and there was no evidence that the steps taken by Soble were within the contemplation of the parties.

The only conclusion to be drawn from the testimony presented by the government is that Appellant's alleged connection with the conspiracy ended in 1945 and that the conspiracy also terminated in that year. It is clear therefore that the admission of the post-1945 testimony was prejudicial error and that it was error to instruct the jury that Soble's post-1945 acts were binding on Petitioner. *Kotteakos* v. *United States*, 328 U. S. 750 (1946). It was also grave error to admit hearsay declarations by alleged co-con-

spirators made after the termination of the conspiracy, particularly when the declarations implicated Petitioner, *Krulewitch* v. *United States*, 336 U. S. 440 (1949).

The Court below reaffirmed the rule that "to admit hearsay of conversations after the conspiracy is over, is error" (App. 60a). The Court concluded however that the admission of the hearsay was not error in this case because "the jury must have found that the conspiracy continued past 1945 before it could consider the allegedly prejudicial testimony" (App. 61a). In the absence of any evidence to support such a finding, there was error both in the admission of the hearsay evidence and in the submission to the jury of any question predicated on the continuance of the conspiracy after 1945.

4. *The Trial Court committed error in permitting alleged co-conspirators to testify about their own conduct and Petitioner's alleged conduct unrelated to the conspiracy, that purportedly occurred many years before the conspiracy started and long after it ended.*

One of the witnesses, Floyd Miller, a writer of fiction (R. 1012) did not meet Petitioner or any of the alleged conspirators until 1944 (R. 1024-1026). However, he was allowed to testify about his agitational propaganda work for the Communist Internationale in 1936 (R. 1013-1014), about his wire-tapping for the Communist party in 1937 (R. 1017), about his infiltrating the Seafarer's International Union in 1941 (R. 1020-1021) and about his transmitting reports on seamen sailing to Murmansk in 1941 (R. 1021). Miller's only dealing with the Petitioner, it will be remembered, was to advise Petitioner that he (Miller) had been unable to get a job.

Mrs. Beker's testimony about her own past was more lurid, and prejudicial, and it too was completely

unrelated to the accusations against Petitioner. The conspiracy was supposed to have started in 1940. Mrs. Beker told of her marriage in 1935 to an American in Moscow (R. 1164), about her husband's working for the Russian Secret Police in 1937, about her husband's acting as an informer against his friends (R. 1166-1167), about her husband's abduction by the NKVD and disappearance in 1937 (R. 1168-9), about her working as a spy for the NKVD in Moscow shortly after her husband's abduction (R. 1169-1170), and about her acting as an informer for the NKVD against members of the American Embassy staff in Moscow in 1938 (R. 1172).

The Government also made extended reference to and introduced a great deal of testimony on the subject of Petitioner's and Jack Soble's alleged Communist Party affiliations in Lithuania, Germany and Spain *beginning in 1919*, more than forty years before the indictment was handed down in this case and more than twenty years before the inception of the alleged conspiracy (R. 233-238, 243, 266-323).* The testimony with respect to Petitioner's alleged activity in *1921* was summarized in the prosecutor's summation (without reference to the period of the activity) as follows: "He was so good (a Communist), he was made a member of the Referendum; he was a writer of the philosophy of the communist cause and conspiracy."** (R. 1532, 273-274) (matter in parentheses inserted). Evidence of communist affiliation "can be highly inflammatory in a jury trial" *United States* v. *Rosenberg*, 195 F. 2d 583 at p. 596 (2d Cir.) cert. denied 344 U. S. 838 (1952). Such testimony is admissible only when needed

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* The record is barren of any reference to political activity by Petitioner after the commencement of the alleged conspiracy.

** The writing was not produced.

to prove an essential part of the Government's case and even when there is such a need, the Court is obliged to balance the need against the obvious appeal of such evidence to the prejudices of the jurors. *United States* v. *Rosenberg*, 195 F. 2d at 596. In this case there was a clear abuse of discretion for the testimony in question was not pertinent to the Government's case and the Trial Court completely ignored its prejudicial effect.

Presumably the evidence of Communist Party membership and activity was offered to prove Petitioner's intent and motive in engaging in the alleged conspiracy (R. 1591). But no rational connection was or could have been shown between Petitioner's alleged membership in the Lithuanian Communist party in 1919, or his alleged advocacy of Communism in 1921, and a conspiracy in the United States in 1940, *Boijer* v. *United States*, 132 F. 2d 12, 13 (D. C. Cir. 1942). Here most of the testimony with respect to Petitioner's alleged communist activities related to a time so remote as to have no probative value on the issue of intent or on any other issue in the case. The tendency and indeed the purpose of the testimony was so clearly to create hostility against Petitioner that its exclusion would have been required even if there had been valid ground for its admission.

The testimony of the criminal actions and evil conduct of the other alleged conspirators unrelated to the conspiracy was detrimental to the Petitioner because as an alleged associate of the witnesses he was tarred with the same brush. As Mr. Justice Jackson put it, "it is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together" *Krulewitch* v. *United States*, 336 U. S. at p. 454 (concurring opinion). The testi-

mony of activities of the alleged conspirators after the conspiracy ended in 1945 was completely irrelevant and prejudicial particularly because of the cessation after that time of cooperation between the United States and the Soviet Union.

5. The Petitioner's alleged conduct did not relate to the national defense and was not within the scope of the statutes on which the indictment is based.

This case involves an important question with respect to the construction of 18 U. S. C. 793 and 794 and with respect to the permissible extension of the much criticized concept of criminal conspiracy. The genesis of the conspiracy was an alleged arrangement with Beria that had nothing to do with national defense or for that matter with the United States (R. 611-612). The principal witness to the making of the alleged conspiratorial agreement disavowed any intent to obtain information other than that relating to embroilments between various factions of the communist movement (R. 669-670).

In its opinion in this case the Court of Appeals said "(the quoted purpose (of the Beria agreement) certainly cannot reasonably be construed to have *excluded* the gathering of national defense information" (App. 56a) (emphasis ours). Upon a trial of a capital case the Government must do more than to present an innocuous agreement and to state that a possible later illegal construction was not precluded.

The Court below suggested that the alleged conspiracies related to the national defense because Petitioner secured information from a department of the OSS (App. 56a-63a). The mere fact that the Biographical Records Unit was a branch of the OSS could not affect the nature of the

material allegedly sought or received by the alleged conspirators. As Professor Hughes testified at the hearing on the motion for a new trial, the OSS had ten or twelve different branches (R. 2071). A "tight" wall was maintained in the OSS itself between those branches entrusted with secret material and those that were not (R. 2074). The Biographical Records Unit was a department of the Research and Analysis Branch, one of the "far-less-secret branches of the OSS" (R. 2072, 2074). The Research and Analysis Branch did not deal with or receive information relating to the war-effort of the United States (R. 2076) and the Biographical Records Unit had no access to secret material (R. 2531).

The case at bar cannot be distinguished from *United States* v. *Heine*, 151 F. 2d 813 (2d Cir. 1945) cert. denied 328 U. S. 833 (1946), which also involved materials culled from public sources that the Court found did not relate to the national defense. The reliance of the Court below upon *Gorin* v. *United States*, 312 U. S. 19 (1941) affirming 111 F. 2d 712 (9th Cir. 1940) was misplaced. *Gorin* v. *United States* was an appeal from a conviction of obtaining and conspiring to obtain reports from the files of a Naval Intelligence office. The reports turned over to Gorin were concerned with Japanese espionage activities in the United States. Gorin argued that since the reports that he secured dealt with Japanese espionage that had not been effective and contained no information relating to the armed forces, arms, or military equipment of the United States they did not relate to "national defense" within the meaning of the Espionage Act.

We think it clear that the situation presented in Gorin is not analogous to the one in the case at bar. Under the rule of the *Gorin* and the *Heine* cases the substance and

the availability to the public, of the information sought must be considered in determining whether a plot to secure information is a conspiracy to secure "national defense" data within the meaning of the Espionage Act. In the instant case it has not been shown that any of the information sought or secured by the alleged conspirators was secret or related to defense matters.

The sole item of information allegedly transmitted to Petitioner that had even a remote connection with "arms and equipment of the United States armed forces", to use the phrase of the indictment, was the alleged report delivered by Hirschfeld to Beker in the Spring of 1945. That report, it will be recalled, was said to relate to activities in Hirschfeld's office and was to the effect that "the United States Government was working in some important military project and making great progress with it and this would decide the end of the war" (R. 1207).

We have shown previously that the Government was aware that Mrs. Beker's testimony was not true. Moreover, statements to the effect that new weapons were being developed, were common street gossip during the period in question. Certainly the allies and the enemies of the United States were aware during the war years that the United States was attempting to develop new weapons. Statements to the effect that extremely effective new weapons had been developed were broadcast during that period by the German and Allied forces (R. 1944). In any event the alleged reference to a project somewhere in the northwest is so vague and indefinite that it could not possibly have been of use "to the injury of the United States, or to the advantage of any foreign nation" and therefore was not within the orbit of Sections 793 or 794 of the Espionage Law. See *Gorin v. United States*, 312 U. S. 19, 29-30 (1941).

Nor was the statement about the military project within the scope of the alleged conspiratorial agreement. Every witness who testified about alleged conspiratorial activities, including Mrs. Beker, spoke of attempts to obtain information regarding Mensheviks, Trotskyites and individual Germans and German political groups. If one member of a conspiracy to secure innocuous information secures secret military data and puts it into the conduit, the other members cannot be held guilty of a conspiracy to obtain such information. *United States* v. *Crimmins*, 123 F. 2d 271, 273 (2d Cir. 1941). No testimony was offered to show that the Petitioner or any member of the alleged conspiracy other than Hirschfeld (who is not named as a conspirator in the indictment) ever attempted, or intended, to obtain information about military developments. All evidence of intent was to the contrary.

6. Prosecution of the conspiracy to obtain national defense information, charged in Count 1 of the indictment, was barred by the Statute of Limitations. The submission to the jury of the barred Count was prejudicial error requiring reversal of the conviction of the charge of conspiracy to transmit national defense information.

The alleged conspiracies ended in 1945 or at the latest in 1946. At that time and until September 23rd, 1950 the applicable period of limitations was three years. Act of June 25, 1948, Ch. 645, Pt. II, Ch. 213, §3282, 62 Stat. 828.* Prosecution of the charge in Count 1 was thus barred in 1949 by the three year statutory period of limitations then in effect. By the Internal Security Act of 1950, Chapter 1024, §19, 64 Stat. 1005, the period of limitations for violation of 18 U. S. C. §793 was extended to ten years. The

* Enacted as § 3282 of Title 18, U. S. C. (1948 ed). The present § 3282 of Title 18, U. S. C. was enacted in 1954.

September 23, 1950 enactment did not by its terms have any effect on cases already barred by the Statute. But prosecution of the offense charged in Count 1 is barred even under the ten year statute because the conspiracy terminated fourteen or fifteen years before the indictment was filed in November 29, 1960 (R. 1663).

The Court below recognized that "whether or not prosecution under Count 1 was barred presents a serious question". It declined to determine that question because it said, referring to the fact that Petitioner had been sentenced to life imprisonment on the Second Count, that "The sentence imposed on count 1 did not increase defendant's term of imprisonment" and there was "no proof with respect to count 1 which was not equally admissible with respect to count 2" (App. 78a).

We believe the Court erred in assuming that all the testimony with respect to Count 1 of the indictment had also been offered or would have been admissible with respect to Count 2. We believe the Court also erred in assuming that it was not prejudicial error to submit to the jury the question of Petitioner's guilt on a charge that had been barred. *See Flemister v. United States*, 260 F. 2d 513 (5th Cir. 1958) and *United States v. Siebricht*, 59 F. 2d 976 at 978 (2d Cir. 1932).

Moreover, the testimony concerning the "important military project" that the Government considered critical, was admitted presumably, with respect to the charge of conspiracy to *obtain* defense information* for it was not under any tenable theory admissible with respect to the charge, in the Second Count, of conspiracy to *transmit*

* On the theory as the Court instructed the Jury, that Petitioner's participation in the conspiracy could be determined by his conduct (App. 61a; R. 1583), in this case his receipt of the information.

defense information. No evidence was offered to show that that information was ever given to the Soviet Union or any of its agents, and no evidence was introduced to show that the parties ever agreed or conspired to transmit information of that kind. The testimony with respect to the alleged agreement to transmit related only to information about Mensheviks, Trotskyites and German civil servants and the purpose of that alleged conspiracy could not have been changed by the act of one conspirator in securing military information and attempting to put it into the conduit. *United States* v. *Crimmins*, 123 F. 2d 271 at 273 (2d Cir. 1941).

Although the indictment charged two separate offenses, namely the conspiracy to secure defense information and a separate conspiracy to transmit such information to a foreign country, the same overt acts were alleged to support both counts; (R. 1742-1746) the prosecution did not, in the presentation of its case distinguish between the two Counts and the Trial Court did not instruct the Jury with respect to the facts they were required to find to establish the charge in Count 1 as distinguished from the charge in Count 2. Although there were occasional references to the separate offenses in his charge to the Jury the Trial Judge spoke repeatedly of the two offenses as a single conspiracy. The following is illustrative:

> "You must first determine from all the evidence in the case, relating to the period of time defined in the indictment, whether or not a conspiracy existed. If you decide that a conspiracy did exist, you must next determine whether or not the defendant was a member of the conspiracy." (R. 1584)
>
> "I charge you that whether the Union of Soviet Socialist Republics was an ally or friendly nation during the period of the alleged conspiracy is immaterial. . . ." (R. 1586-7).

"The evil which the statute, so far as this case is concerned, punishes is the obtaining, receiving, and transmitting of this guarded information. . . ." (R. 1587).

"Such proof is not enough, by and of itself, to justify your concluding there was an unlawful conspiracy, but you may consider this along with other evidence in the case in determining whether or not the subject or the object of the alleged conspiracy was to gather and transmit to the USSR information and documents concerning the national defense of the United States. . . ." (R. 1609).

The repeated submission of the case to the jury as a single conspiracy aggravated the error of submitting the First Count barred by the Statute of Limitations. See *Yates* v. *United States*, 354 U. S. 298, 311-12 (1957).

For the reasons outlined, it is submitted that the questions presented are substantial, that this petition for a writ of certiorari should be granted, and that a plenary consideration of the issues is warranted.

May 8, 1962.

Respectfully submitted,

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